BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

In order to avoid confusion, the following table of dates is set out:

February 5, 1916. American Oil & Refining Company (Oklahoma Corporation) organized under the laws of Oklahoma for duration of 20 years (R. 25).

May 14, 1934. American Oil & Refining Company (Nevada Corporation) organized at Reno, Nevada (R. 81).

June 19, 1934. Majority stockholders of Oklahoma Corporation authorize transfer of all assets of Oklahoma Corporation to Nevada Corporation (R. 83).

July, 1934. Transfer of part (only) of assets to Nevada Corporation (R. 83).

February 5, 1936. Charter of Oklahoma Corporation expired by limitation of time.

March 19, 1938. Globe Pipe Line Co., a creditor of Nevada Corporation, sued Nevada Corporation, in Case No. 2050, U. S. District Court Court for Western District of Oklahoma. A. C. Fletcher appointed receiver of Nevada Corporation on same date by agreement (R. 223).

April 11, 1938. This suit filed in state District Court, Oklahoma County, Oklahoma.

April 14, 1938. State District Court, upon hearing, appointed E. F. Lester receiver of dissolved Oklahoma Corporation (R. 15).

April 29, 1938. Former officers of dissolved Oklahoma Corporation (all defendants herein) attempted to revive Oklahoma Corporation by filing amended

articles of incorporation extending life for 20 years and making other fundamental changes (R. 102).

April 29, 1938. Plaintiff in case No. 2050, filed amended bill making "revived" Oklahoma Corporation a party to that suit and asking for appointment of a receiver (R. 104).

May 11, 1938. One of the defendants filed bond and petition for removal of this case to U. S. District Court for Western District of Oklahoma.

October 5, 1939. Plaintiffs' motion to remand to state court overruled (R. 235).

The first 8 sections of this brief contain statements of the principles of law applicable to certain features of this case. Section IX is devoted specifically to a discussion of the assignments of error contained in the petition.

I

There is no statutory authority in Oklahoma for the consolidation of two corporations.

Hence the transfer of all of the property of one corporation to a new corporation formed for that purpose does not constitute a consolidation or end the life of the old corporation, but it continues to exist as a separate entity until its charter expires. This is the holding of the court in *Topeka Paper Co.* v. *Oklahoma Publishing Co.*, 7 Okla. 220, 54 Pac. 455.

Therefore, the Oklahoma Corporation continued to exist after the *partial* assignment of its assets to the Nevada

Corporation in June, 1934, until its charter expired on Feb. 5, 1936.

II

The receiver of the Nevada Corporation had no authority to bring suit on behalf of the Oklahoma Corporation or its stockholders.

It is elementary that the receiver of the Nevada Corporation could bring suit only on claims belonging to the Nevada Corporation. But these claims against the officers, directors and majority stockholders were for damages to the Oklahoma Corporation. They all existed before the Nevada Corporation was organized, except as to the claim for the wrongful assignment of property to it. They constituted *assets* of the Oklahoma Corporation that were never assigned to the Nevada Corporation (R. 83-84). The directors of the Oklahoma Corporation could not have assigned these claims (against themselves) to the Nevada Corporation without the assent of the stockholders. This is conceded. They remained the property of the Oklahoma Corporation until its charter expired on February 5, 1936, and then became the property of its stockholders.

Baker v. *Allen*, 292 Mass. 169, 197 N. E. 521.

United Zinc Co. v. *Harwood*, 216 Mass. 474, 103 N. E. 1037.

If the receiver of the Nevada Corporation were permitted to recover on these claims, the recovery would be the property of the Nevada Corporation and subject to its

debts. We submit that the 872 stockholders of the Oklahoma Corporation who never surrendered their stock and are strangers to the Nevada Corporation have a right to have these assets recovered for their benefit, unincumbered by the debts of the Nevada Corporation.

True, these 872 stockholders of the Oklahoma Corporation might waive the illegality of the attempted transfer to the Nevada Corporation, join the Nevada Corporation, and, if anything remains after its debts are paid participate in any distribution that might be made to its stockholders. But this Court has held in *Geddis* v. *Anaconda Copper Co.*, 254 U. S. 590, 65 L. ed. 425, 431, "Minority stockholders may not lawfully be compelled * * * to elect between losing their interest or entering a new company."

III

Minority stockholders of a dissolved corporation may bring a derivative or class suit in behalf of all of the stockholders for an accounting and to wind up the affairs of the dissolved corporation.

Mason v. *Pewabic Mining Co.*, 133 U. S. 50, 33 L. ed. 524.

Gardner v. *Automatic Arms Co.*, 275 Fed. 697.

Stearns Coal Co. v. *Van Winkle*, 221 Fed. 590.

Louisville Trust Co. v. *Knott*, 130 Fed. 820.

At the time this suit was instituted, April 11, 1938, there was no receiver for the Oklahoma Corporation or its affairs. The only persons other than the stockholders who

could have brought the suit were the statutory trustees whose duty it was to protect the interests of the stockholders. But, under the allegations of the complaint, they were the guilty parties and could not be expected to sue themselves. These petitioners as minority stockholders, therefore invoked the only remedy they had when they brought this suit.

It should be kept in mind that this is not a suit to dissolve a corporation. The Oklahoma Corporation was already dissolved by the expiration of its charter under the express provisions of Section 9778 O. S. 1931 (Appendix I). It is a suit to wind up the affairs of a "dissolved" corporation.

IV

Neither the directors nor the majority stockholders of a solvent going corporation can legally transfer all of its property to another corporation without the unanimous consent of all of the stockholders.

People v. *Ballard,* 134 N. Y. 269, 32 N. E. 54.

Parish v. *Cieneguita Copper Min. Co.,* 12 Ariz. 235, 100 Pac. 781.

Moore v. *Los Lugos Mines,* 172 Wash. 570.

Geddes v. *Anaconda Copper Min. Co.,* 254 U. S. 590, 65 L. ed. 425.

Forrester v. *Boston Elec. Co.,* 21 Mont. 544, 55 Pac. 229.

In the last cited case, the court reviews the decisions and states that the rule is universal.

V

Surrender of stock in such an exchange, by a stockholder induced by fraud of majority stockholders or by concealment of facts or by failure to inform minority stockholder of his legal rights, is not a ratification of the illegal act.

This is because of the fiduciary relation. *Garrett* v. *Reid-Cashion Land and Cattle Co.*, 34 Ariz. 245, 270 Pac. 1044. This opinion contains a most exhaustive review of the authorities.

VI

Minority stockholders induced by fraud to surrender their stock, may join those not surrendering, in a common suit, and equity will consider them in their original status in order that they may participate in any recovery.

Backus v. *Findelstein*, 23 Fed. (2d) 531.

Green Inv. Co. v. *Booth*, 62 Fed. (2d) 321.

Wilcox v. *Harrison Sec. Corp.*, 10 Fed. Sup. 532.

Joined in this suit with the plaintiffs who still own their original certificates of stock in the Oklahoma Corporation aggregating 18,530 shares, are owners of 67,847 shares who surrendered their certificates of stock in the Oklahoma Corporation and accepted shares in the Nevada Corporation (R. 33-34). They allege that they were induced to make such surrender through the fraud of the officers of the corporation (R. 84-87). They claim the right to join in this common suit as the *equitable* owners of shares in the Oklahoma Corporation and participate in the recovery (R. 112).

But even if these surrendering stockholders are improperly joined, under Rule 21 of Federal Rules of Civil Procedure, this would not be ground for dismissal and the legal owners would be permitted to pursue their remedy.

VII

Majority stockholders, controlling stockholders or "dominant stockholders" are fiduciaries and are liable to restitution for losses due to fraudulent acts resulting from such control.

The names of the controlling stockholders and the nature and extent of their control are set forth in the complaint (R. 28-29).

Hyams v. *Heckla Min. Co.*, 221 Fed. 529.

Southern Pacific v. *Bogert*, 250 U. S. 483, 63 L. ed. 1009.

Pepper v. *Litton* (1939), 308 U. S. 295, 84 L. ed. 281.

Jones v. *Missouri Elec. Co.*, 144 Fed. 765.

Heim v. *Jobes*, 14 Fed. (2d) 29.

Meeker v. *Winthrope Iron Co.*, 17 Fed. 48.

VIII

Neither the Nevada Corporation nor its receiver is a necessary party to this suit.

In the opinion of the Circuit Court it is recited that the trial court held that the receiver of the Nevada Corporation is a necessary party to this suit. The Circuit Court did not specifically approve this holding.

An examination of these opinions discloses that there is a misconception of the nature of this suit, namely that this is a contest over the possession of property in the hands of the Nevada receiver. There is no such contest. The complaint shows that practically all of the visible assets of both corporations has disappeared. It is true that the receiver of the Nevada Corporation might have found some tangible properties. It is apparent, however, that this small remnant would be inadequate to compensate plaintiffs even for the properties wrongfully taken over by the Nevada Corporation leaving out of consideration other misappropriations. Besides, the creditors might claim that they gave credit to the Nevada Corporation relying on its possession of these tangibles. Plaintiffs sought no contest with these creditors. On the contrary, they specifically elected to hold their fiduciaries liable for the unlawful diversion to the Nevada Corporation (R. 91) along with the other alleged diversions.

In this particular, the case is parallel to the famous and much cited case of *Heath* v. *Erie Ry. Co.*, 11 Fed. Cases 976, Case No. 6306.

There the bill of the minority stockholders showed a multitude of fraudulent transactions, participated in by at least 15 of the 17 directors, by which they profited themselves and by which wrongful diversions were made to one Vanderbilt, The Narragansette Steamship Co. and other named individuals and corporations. The plaintiffs evidently felt that three of the guilty directors, Gould, Fisk and Lane were able to respond in damages. They there-

fore elected not to pursue the property into the hands of the other conspiring individuals and corporations, but sued Gould, Fisk and Lane and attempted to hold these three directors liable for full restitution for all of these wrongful acts.

These three defendants demurred to the bill on the ground of defect of parties, claiming that the other 12 guilty directors and the conspiring individuals and corporations named in the bill were necessary parties. The court held (page 1000) that in breaches of trust of this nature, the plaintiffs could at their election sue any number or all of these joint tort feasors and that the others were not necessary parties.

In the instant case, the Nevada Corporation is a mere joint tort feasor. It took property of the Oklahoma Corporation wrongfully. The guilty knowledge of its officers was its guilty knowledge. Its own stock records would show that approximately 49 per cent of the stockholders of the Oklahoma Corporation did not consent to the transfer. The fact that it had assumed the same name as the Oklahoma Corporation gave it no more immunity than if it had called itself the Narragansette Steamship Co. Plaintiffs are not attempting to take any property in the possession of the receiver of the Nevada Corporation. That corporation has no interest in and is not affected by this suit in behalf of the dissolved Oklahoma Corporation against its fiduciaries for damages done to the Oklahoma Corporation. nor will it be affected by any distribution the court may make of the amount recovered. If it does claim any in-

terest, the receiver of the Nevada Corporation may intervene in this case at any time.

Besides, under the liberal provisions of Rule 21, F. R. C. P. the court of its own motion or upon the motion of any party may make additional parties.

Attention is here called to a statement in the opinion of the Circuit Court to the effect that Lester, the receiver, did not take possession of any assets of the Oklahoma Corporation (R. 243). This was necessarily true, for the receivership in this case was virtually in a state of suspension from the time of the filing of the petition for removal on May 11, 1938, until the federal court overruled the motion to remand on October 5, 1939 (R. 235). After that date, the receiver could act and there was much that the receiver could have done after that date. For instance, in subdivision 4 of Count 5 of the complaint (R. 55-56) it is recited that from 1922 to 1929, $90,000 of corporate funds were invested in lands, oil and gas leases and mineral rights, title being taken in certain of defendant majority stockholders as set forth in "Exhibit I" (R. 162-171). Apparently these properties were still in the possession of these trustees *ex maleficio* under claim of ownership for the corporations had attorned to their ownership and possession by paying rentals to them on at least part of them (R. 55-56). Under the order of appointment it was the duty of the receiver to "ascertain" and collect the assets of the Oklahoma Corporation. It must be kept in mind, however, that the receiver is an arm of and acts under the direction of the court and not of the parties. It is apparent from the

opinion of the trial court that it never recognized the validity of the appointment of Lester as receiver by the state court. Upon his death in July, 1940, it refused to appoint a successor. Petitioners respectfully urge that the trial court was in error in this conclusion and that had he not entertained this erroneous conclusion he would have directed Lester as receiver to investigate these properties mentioned in the complaint not in the possession of the receiver of the Nevada Corporation and report to the court the status of same and make demand that these trustees deliver possession to the receiver.

What disposition, if any, has been made by the defendant in possession of these lands leases and mineral interests purchased with corporate funds? Have any of them produced oil or gas? Have any rentals, bonuses or royalties been collected from them? The court cannot make personal investigations of such matters. They are proper functions of a receiver and were clearly contemplated by the order of the state court appointing him (R. 15-16).

Thus, while the plaintiffs in their complaint elected to hold their fiduciaries liable for the full value of the property illegally taken over by the Nevada Corporation, rather than to pursue the remnant of this property of questionable value possessed by the receiver of the Nevada Corporation, yet it did not forego its claim to other tangibles that might be found that had not been assigned to or taken over by the Nevada Corporation.

IX

Further consideration of assignments of error set forth in the Petition.

1. ***First and second assignments of error.***

These two assignments of error are considered together for they involve the same legal principles.

Petitioners believe that under the principles set forth under previous sections of this brief, these petitioners filed a proper action for the redress of the wrong done to the Oklahoma Corporation, in the state court on April 11, 1938. In fact, that they sought the only remedy available to them under the recognized practice in equity in such matters. It was an action, among other things to wind up the affairs of the dissolved Oklahoma Corporation and the state court had appointed a receiver in order to effect this purpose. It was thus pending in the state court during the entire month of April, 1938, when the defendants sought to interfere by the attempted revival and the attempt to subject it to a receivership in another court of coordinate jurisdiction.

The case cited in the petition, together with others herein cited, demonstrate that the courts always protect the jurisdiction of the court over the prior or dominant case against a court entertaining another case subsequently filed. The means by which this protection is effected varies with the circumstances.

In *Adams* v. *Mercantile Co.*, cited in the petition, a federal court yielded to a prior case in the state court. In

the *Louisville Trust Co.* case, the Circuit Court of Appeals reversed the trial court for its refusal to so yield. In the case of *Porter* v. *Sabin*, this Court upheld the lower court in dismissing a case because of a prior receivership of the corporation in a state court, using the strongest possible language in emphasizing the exclusiveness of the control in the prior case. Only a part of this language is quoted.

> "Page 479. * * * the court assumes the administration of the estate; the possession of the receiver is the possession of the court. * * *
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> "The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that court, remains in its custody, to be administered and distributed by it. Until the administration of the estate has been completed and the receivership terminated, no court of the one government can by collateral suit assume to deal with rights of property or of action, constituting part of the estate within the exclusive jurisdiction and control of the courts of the other."

In *Harkin* v. *Masters*, the court repudiated acts of the officers during the liquidation, not because they were within themselves illegal, but because such acts interfered with the administration of the court while all of "the affairs" of the corporation were in "*custodia legis.*" Likewise in the *Associated Oil Co.* case, the court refused to give legal effect to the acts of corporate officials during receivership.

In the *Chillicothe Furniture Co.* case, the court enjoined parties from litigating in another court a matter

concerning corporate affairs while such affairs were being wound up. This remedy by injunction has been frequently resorted to to prevent interference in another court. *Berg* v. *Fidelity & Casualty Co.*, 274 Fed. 311.

In this case, at the first opportunity after the motion to remand had been overruled, the petitioners in their supplemental complaint recited the attempted interferences and prayed that the court hold the attempted revival invalid as far as it affected this case. This cannot be taken as a collateral attack on the "revived" corporation. *Jones* v. *Missouri Electric Co.*, 144 Fed. 765, 775. They prayed that the defendants be enjoined from litigating the issues in this case as between themselves and the Oklahoma Corporation in any other case except this case.

In *Atlas Supply Co.* v. *Roberts*, 180 Okla. 100, 68 Pac. (2d) 76, the Supreme Court of Oklahoma upheld the action of the trial court in proceeding to judgment regardless of the action of another court over the same matter in a subsequently filed case, the case of course being an action *in rem*.

In *State* v. *District Judge*, 108 Okla. 132, 235 Pac. 234, the same court protected the court's jurisdiction over the case first filed, concerning a fund on deposit in a bank, by prohibition, and held that the judgment obtained in the meantime in another court, in a case subsequently filed, was void for want of jurisdiction. In that case, the learned Vice Chief Justice made some very pertinent remarks about the "concerted action" between the parties in the second case getting a speedy judgment before the first case

came to issue. The record in this case indicates the same concerted action. On the same date that Case No. 2050 was filed against W. B. Skirvin and the Nevada Corporation, A. C. Fletcher, a representative of the plaintiff, Globe Pipe Line Co. (R. 104) was appointed receiver. On the same day that the defendants attempted to revive the Oklahoma Corporation, April 29, 1938, the Globe Pipe Line Co. filed its amended bill in Case No. 2050, seeking to make the "revived" Oklahoma Corporation a party defendant and to have a receiver appointed for it. This culminated in the appointment of A. C. Fletcher as receiver for the "revived" Oklahoma Corporation. During the long interval between the filing of the motion to remand and its denial on October 6, 1939, during which time these petitioners were helpless to make any move, the defendants in this case intervened in Case No. 2050 in an attempt to get all matters as between themselves and the Oklahoma Corporation adjudicated, without any contest on the part of the receiver (R. 105).

The instant case is stronger than the case last cited. There the party securing the judgment in the second case filed was a stranger to the first case filed. Here the parties attempting to get adjudications in Case No. 2050 of the issues involved herein are all parties to this suit.

In this connection, it should be kept in mind that while Case No. 2050 was filed on March 19, 1938, it was then only a case against the Nevada Corporation and W. B. Skirvin. The Oklahoma Corporation was not made a party to that case or process served on it until April 29, 1938. This date

was subsequent to the filing of this case and subsequent to the appointment of a receiver herein. The affairs of the Oklahoma Corporation were already in *custodia legis* in this case in the state court.

Petitioners are not parties to Case No. 2050. They respectfully urge that they have a right to their day in court on the issues tendered by them in this case long before the Oklahoma Corporation was made a party to Case No. 2050, unaffected by any attempted adjudications since that time in the latter case.

The court below correctly held that when a case is removed from a state court to a federal court, the receiver appointed by the state court before removal becomes the receiver in the federal court without affecting his previous powers (R. 246). In other words the status of the case and the rights of the parties remain the same after removal as before.

It so happens that this case was removed to the same court in which Case No. 2050 was then pending. There was no consolidation. They remained separate cases. The rights of these petitioners; the advantages they obtained by the timely assertion of liens on valuable property and other priorities obtained by their diligence were most certainly not affected by the pendency of another case in the same court to which this case was removed.

2. *Third assignment of error.*

The specific restrictions contained in the opinion in the case of *Loeffler* v. *Federal Supply Co.*, cited in the petition and in the opinion of the court below, raise the strongest possible inference that the Supreme Court of Oklahoma intended to exclude cases of this kind from the operation of the statute permitting the revival of a corporation by an amendment to its articles of incorporation.

The Oklahoma Corporation on the 29th day of April, 1938, was not a going concern, and, without any working capital, could not be made into a going concern. Steps were then being taken in a court of competent jurisdiction to wind up its affairs. To revive it meant to put its management back into the hands of officers against whom charges of the most flagrant nature were pending in the liquidation suit, unanswered.

The Supreme Court of Oklahoma in the case of *Dill* v. *Johnson*, 79 Okla. 149, 179 Pac. 608, went so far as to dissolve a corporation which was a going concern in order to prevent it from going back under the control of majority stockholders who had previously defrauded it. To the same effect is *Miner* v. *Belle Isle Ice Co.*, 73 Mich. 97, 53 N. E. 218. In *Hartman* v. *Masters, supra,* the court refused to reorganize a corporation where the effect would be to put unfaithful majority stockholders back in control.

The invalidity of the revival, claimed under this assignment of error, is of course in addition to that claimed under the first assignment, where your petitioners have

urged that at the time of the attempted revival, the affairs of the dissolved corporation were in *custodia legis* which excluded any interference by its former officers.

Attention is called to another pernicious result of a rule that trustees may revive a dissolved corporation while a court is attempting to wind up its affairs.

In Count 7 of the complaint, your petitioners charge that the defendant trustees and majority stockholders secretly expended $1,190,000. of the funds of the Oklahoma Corporation in the erection of the Skirvin Tower annex, and that such acts were beyond the corporate powers contained in its articles.

The defendant trustees evidently recognized that the erection of the Tower or any other building was not authorized, for the amended articles of April 29, 1938 (R. 202), contain this provision: "and the Amended Articles of Incorporation are made specifically to include the right not only to own real estate but to erect buildings thereon."

This provision could have no value for future acts for the "revived" corporation had no funds with which to erect new buildings. It is patent that the only effect would be under the retroactive force of amendments under Section 9732, O. S. 1931 (Appendix II) which provides: "From which date the amendments shall relate back and be considered and be a part of the original articles of incorporation to the same effect as if originally set forth therein."

All of the persons executing these amended articles were defendants, charged with this specific ultra vires mis-

appropriation. By this retroactive amendment (if effective) they have legalized their previous illegal acts.

Such acts of the defendants and the advantages claimed by them as a result thereof may be summarized as follows:

While the state court was engaged in winding up the affairs of the dissolved Oklahoma Corporation, which they had stripped, abandoned and apparently forgotten until reminded by this suit, they rushed to the office of the Secretary of State with amended articles extending the life of the corporation 20 years, and with other changes.

Now in effect, they claim:

1. That the court no longer had any control over the affairs of the Oklahoma Corporation for they have taken such control away from the court by the amendment and placed it back in their own control as directors of the "revived" corporation.

2. That the court cannot proceed to wind up its affairs for it is no longer a "dissolved" corporation because its life has been extended 20 years.

3. That the court cannot hold them liable for certain ultra vires acts charged against them for they have by their own retroactive fiat legalized the acts.

If, as apparently contended by the defendants, the statutory power to amend is independent of the control of a court of equity attempting to administer the affairs of a corporation, the defendants may at any time in the future, if pressed too hard in the litigation, relieve themselves of

any liability by filing a retroactive amendment to the articles of incorporation authorizing the act complained of—and this without the consent of the court. Petitioners urge that a court of equity cannot be thus thwarted by wrongdoers.

3. ***Fourth assignment of error.***

The conclusions of law contained in the opinion of the Circuit Court to the effect that this stockholders' derivative suit abated, either upon the subsequent appointment of a receiver in the case or by the failure of the receiver to be substituted as plaintiff or by the failure of the plaintiffs to secure formal consent of the court to prosecute the suit in their own names, is not only contrary to the cases cited in the petition, from other circuits but is contrary to all other cases which we have been able to find. Among these are the following:

St. Louis, C. G. & F. S. Ry. Co. v. *Holliday*, 131 Mo. 440, 33 S. W. 49.

Patrick v. *Eels*, 30 Kans. 680, 2 Pac. 116.

McAnarney v. *Lembeck*, 97 N. J. Eq. 361, 127 Atl. 197.

It is true that the uniform rule is that where there is either a disinterested board of directors or disinterested trustees or a receiver for the corporation at the time the stockholders desire to institute the suit, they must first make demand upon such official representative or representatives of the corporation before bringing the suit in

their own names. This is due to the requirement that the stockholders must exhaust every other means of redress before bringing the suit themselves, and not because of their lack of material interest in the subject matter of the suit. In fact, the very foundation of what is known in equity as a "minority stockholders' suit" is that the minority stockholder has such an interest in the redress of wrongs to the corporation that he may institute the suit where the representatives of the company refuse to do so. Our research discloses no case that holds that the subsequent appointment of a receiver in a suit begun by minority stockholders limits the right of these stockholders to continue to prosecute the suit to a final conclusion.

Here, there was no receiver of the Oklahoma Corporation at the time this suit was filed. The statutory trustees could not be expected to sue themselves, hence no demand on them was necessary, under all of the authorities.

In fact, an examination of reported cases discloses that it is the usual and accepted course of judicial proceedings in this class of cases for the minority stockholders' suit to continue in their names to final judgment even though a receiver is appointed in the case. In fact, we believe that it is the universal practice. Among these cases are the following:

Forrester v. *Boston & M. Const. etc.*, 29 Mont. 397, 74 Pac. 1088.

Oklahoma Sheep and Cattle Co. v. *Hastings*, 80 Okla. 109, 194 Pac. 223.

Riverside Refining Co. v. *Lynch*, 114 Okla. 198, 243 Pac. 967.

Bilby v. *Morton*, 119 Okla. 15, 247 Pac. 384.

The fact that courts so universally follow this practice without question is as persuasive as to the correctness of this procedure as are adjudicated cases to that effect.

CONCLUSION

In conclusion, petitioners call attention to the fact that the allegations contained in the complaint, of vast fraud and of the most flagrant violation of their fiduciary duties by the defendants stand confessed as true by their motions to dismiss and that the judgment of the Circuit Court of Appeals is not upon the merits of the case but concerns procedural matters only.

Petitioners submit that under the authorities cited in this brief, the conclusions of law upon which the judgment of the Circuit Court of Appeals is based are not only contrary to the decisions in other circuits but that they constitute a radical departure from the usual and accepted course of judicial proceedings in minority stockholders' suits. That this departure nullifies the beneficial effects of the timely assertion of liens on valuable property and other advantages gained by the diligence of petitioners in the timely filing of this suit and obtaining process on both resident and non-resident defendants, and will in all probability defeat full recovery and satisfaction for the wrongs alleged against the defendants if they are compelled to institute another suit.

Petitioners further submit that if the opinion of the

Circuit Court of Appeals in this case is permitted to stand as the announced law in this circuit that it will operate as a positive deterrent against minority stockholders of a dissolved corporation attempting to assert the only remedy available to them under the accepted equity practice in the redress of wrongs committed against the corporation by those in charge of its affairs, for the reason that they will realize under the rule announced that the wrongdoers, can without the consent of the court remove the control of corporate affairs from the court and its receiver and place it back in themselves as directors, by the simple device of reviving the dissolved corporation. That by this revival, these same wrongdoers can prevent the winding up of the affairs of the corporation although it does not have a single qualification for reinstatement as a going concern. That in this indirect way, the intangible assets of the dissolved corporation may be subjected in another suit to the debts of a foreign corporation that has already illegally appropriated to itself and wasted its tangible assets.

Petitioners do not mean to infer that the honorable members of the court below intended any such consequences as above enumerated, but petitioners do urge that the court erred in the particulars specified and that such harmful consequences are the logical results of such errors. Furthermore, that these results not only work an injustice to these petitioners but, if taken as a precedent, will work like detriment in all future suits of a similar nature, where minority stockholders of a dissolved corporation desire to seek redress for the wrongs against their corporation, by their fiduciaries.

Petitioners, therefore respectfully urge that this is a proper case to call for the exercise of this honorable court's discretion and supervision of these procedural matters, and that the judgment of the Circuit Court of Appeals in this case should be reversed with such directions as to injunctive or other relief as is necessary to protect the court's prior jurisdiction over the subject matter and issues of this suit, and that the defendants in the case below be required to answer on the merits of the case.

Respectfully submitted,

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